IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1989

NO. 88-1125 and NO. 88-1309

HODGSON, et al.,

Petitioners,

v.

MINNESOTA, et al.,

Respondents.

MINNESOTA, et al.,

Cross-Petitioners,

v.

HODGSON, et al.,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF OF MEMBERS OF THE GENERAL ASSEMBLY OF THE COMMONWEALTH OF PENNSYLVANIA, AS AMICI CURIAE IN SUPPORT OF THE STATE OF MINNESOTA

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INTEREST OF THE AMICI CURIAE

Amici are members of the Pennsylvania General Assembly whose names are listed in Appendix A hereto attached. They represent members of both the House and Senate and both the Democratic and Republican parties. Pennsylvania is one of many states which have relied on the sincerity of this Court's statements in *Roe v. Wade,* 410 U.S. 113 (1973), that the right to abortion, as recognized therein, is not absolute and that the states may regulate abortion in a manner which furthers their important and legitimate interests.

In keeping with its duty to protect innocent life and preserve maternal health, the General Assembly has grappled with the abortion issue for the past sixteen years. It has been difficult, however, for the General Assembly to comply with the rulings of this Court regarding abortion, given the inherent uncertainty regarding the contours of *Roe* under its existing trimester framework. It also has been distressing to see the General Assembly's motives for regulating abortion challenged when it has consistently attempted to comply with this Court's own prior rulings. *See, e.g., Thornburgh v. American College of Obstetricians and Gynecologists,* 476 U.S. 744, 764 (1986).

In 1982, Pennsylvania enacted a law requiring parental consent or judicial authorization prior to the performance of an abortion upon a minor child. This law was crafted to comply with this Court's decision in *Bellotti v. Baird,* 443 U.S. 622 (1979)(Bellotti II). However, its enforcement was enjoined prior to its operation on the ground that it did not expressly protect the confidentiality of the judicial proceedings. *A.C.O.G. v. Thornburgh,* 656 F.Supp. 879, 889 (E.D.Pa.1987). The General Assembly, in 1988, enacted even more explicit language governing the judicial bypass proceedings. That statute, like its predecessor, specifically provides that all court proceedings "shall be confidential" and, in addition, provides that the court which conducts the judicial proceedings "shall order a sealed record of the pleadings, submissions, transcripts, exhibits, orders, evidence and any other written material to be maintained." Despite this express language, the district court also

enjoined enforcement of the new law; holding that it did not guarantee absolute confidentiality since "[t]here is no assurance that the minor's petition will be sealed from the moment it is filed." *Planned Parenthood v. Casey,* 686 F. Supp. 1089 (E.D.Pa.1988). *Amici* have a substantial interest in preventing such overly technical and rigid approaches by the lower courts from frustrating the legitimate efforts of the Pennsylvania General Assembly to regulate in this area.

Amici, representing large constituencies in Pennsylvania, also urge the Court to reexamine *Roe* and to overrule it so that states may have greater flexibility in providing additional protections for pregnant women, pregnant minors, and unborn children. A right, on the part of states, must be recognized to deal with those interests according to values inherent in the fabric and traditions of American constitutional law.

SUMMARY OF THE ARGUMENT

Minnesota law requires, with certain exceptions, that both parents of a pregnant minor be notified 48 hours prior to the performance of an abortion on their daughter. The Eighth Circuit Court of Appeals held that prior decisions of this Court required that Minnesota also provide for a judicial procedure whereby the minor could avoid notification if she were found to be mature or that an abortion was in her best interest. No prior decision of this Court, however, requires a state to provide a judicial alternative to parental notice. Moreover, when reviewed under the standards set forth in *Roe* and subsequent decisions, Minnesota's statute is constitutional.

Amici respectfully urge this Court to determine and announce the proper benchmark by which statutes regulating abortion should be judged so that state legislatures may be guided by a clearly enunciated constitutional standard when carrying out their duty to enact legislation in this sensitive and difficult area. *Amici* believe this would best be accomplished by reexamination and overruling of *Roe v. Wade.*

ARGUMENT

I. MINNESOTA'S PARENTAL NOTICE STATUTE IS CONSTITUTIONAL UNDER *ROE v. WADE* AND SUBSEQUENT DECISIONS OF THIS COURT.

Minnesota's law requires that both parents of a pregnant minor be notified 48 hours prior to the performance of an abortion upon her unless: (1) one of the parents cannot be located through reasonably diligent efforts; (2) a medical emergency exists and there is insufficient time to provide the required notice; (3) the written consent of the parties required to be notified already has been provided; or (4) the pregnant minor declares that she is the victim of sexual abuse, neglect, or physical abuse and has notified the proper authorities of that fact. Minn.Stat. §144.343. Believing itself to be bound by prior decisions of this Court, the Eighth Circuit held that Minnesota could not require such notice unless it also provided for a judicial procedure whereby the pregnant minor could avoid notification altogether if she were found to be mature or that an abortion was in her best interest. *Hodgson v. Minnesota,* 853 F.2d 1452, 1456-57 (8th Cir. 1988).

No prior decision of this Court, however, has held that a judicial alternative is required in the context of a parental notice requirement. Thus, that question remains open. Moreover, a requirement of parental notice does not constitute an undue burden on abortion and is rationally related to the state's legitimate interests in protecting the fundamental right of parents to direct the upbringing of their children and in protecting their children from making imprudent decisions involving serious and irreversible consequences. Indeed, even if a requirement of parental notice were considered to constitute an "undue burden," it would be constitutional because it reasonably relates to the state's compelling interests in protecting parental rights, minor children and unborn children.

A. This Court has not Held that States Must Provide a Judicial Alternative to Parental Notice.

A majority of this Court has held that the "relevant legal standards with respect to parental-*consent* requirements are not in dispute." *Planned Parenthood v. Ashcroft*, 462 U.S. 476, 490 (1983) (emphasis added). A state wishing to require parental consent prior to the performance of an abortion on a minor also "must provide an alternative procedure whereby a pregnant minor may demonstrate that she is sufficiently mature to make the abortion decision herself or that, despite her immaturity, an abortion would be in her best interests." *Akron v. Akron Center for Reproductive Health*, 462 U.S. 416, 439-440 (1983).[1]

A majority of this Court, however, has never held that a law requiring parental notice must also provide a judicial alternative to notice. The statutes at issue in *Bellotti II*, *Akron*, and *Ashcroft* all involved parental *consent*, where a veto power was given to parents, rather than parental notice which provides for no such veto power.[2] Indeed, the Court specifically noted in both *Akron* and *Ashcroft* that parental notice provisions were not at issue.[3]

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1. *Amici* recognize that prior decisions of the Court hold that parental consent requirements are invalid without a bypass procedure. However, they note that a majority of the present Court has never adopted that position. Given that the cases relied upon by plaintiffs throughout this litigation involved parental consent and the standards articulated in that context, it would be appropriate for this Court to reevaluate the continuing validity of such decisions. If a minor has no constitutional right to obtain an abortion without parental consent, she surely has no right to do so without parental notification.

2. Although much of the plurality opinion of Justice Powell in *Bellotti II* appears to equate notice and consent provisions, it is clear that a majority of that Court did not hold that notice and consent were equivalent. *See*, 443 U.S. at 654 n.1 (Stevens, J., concurring in judgment, joined by Brennan, Marshall and Blackmun, JJ.) ("Neither *Danforth* nor this case determines the constitutionality of a statute which does no more than require notice to the parents, without affording them or any other third party an absolute veto.") *Id.* at 651-52 (Rehnquist, J., concurring); *Id.* at 656-57 (White, J., dissenting) (continuing to hold his views expressed in Danforth).

3. In *Akron*, the Court stated: "The Court of Appeals upheld §1870.05(A)'s notification requirement . . . . The validity of this ruling has not been challenged in this Court." 462 U.S. at 439 n.29 (citation omitted). *See also, Akron*, 462 U.S. at 469 n.12 (O'Connor, J., dissenting). Also, in *Ashcroft*,

H.L. v. Matheson, 450 U.S. 398 (1981), was the only case in which the constitutionality of a statute requiring parental notice rather than consent was before the full Court.[4] In that case, the Court expressly declined to rule on the question of whether a judicial alternative is necessary in the context of parental notice.[5]

Since no decision of the Court has held that a judicial alternative to parental notice is constitutionally mandated, that question remains open.

B. A Requirement of Parental Notice is Constitutional Because it Does Not Constitute an "Undue Burden" on Abortion and is Rationally Related to Legitimate State Interests.

In *Thornburgh v. American College of Obstetricians and Gynecologists*, 476 U.S. 747 (1986), Justice O'Connor restated the standard under which abortion laws should be reviewed:

> Under this Court's fundamental-rights jurisprudence, judicial scrutiny of state regulation of abortion should be limited to whether the state law bears a rational relationship to

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the Court stated: "The lower courts found that §188.028's notice requirement was unconstitutional. The State has not sought review of that judgment here. Thus, in the posture in which it appears before this Court for review, §188.028 contains no requirement for parental notification." 462 U.S. at 491 n.17 (citations omitted).

4. Although *Hartigan v. Zbaraz*, 484 U.S. 171, 98 L.Ed.2d 478 (1987) involved the Illinois parental notice statute, the Court only affirmed the judgment below by an equally divided vote.

5. "Members of the particular class now before us in this case have no constitutional right to notify a court in lieu of notifying their parents. This case does not require us to decide in what circumstances a state must provide alternatives to parental notification." 450 U.S. at 413, n.22 (citation omitted). *See also, Matheson*, 450 U.S. at 414 (Powell, J., concurring) ("I join the opinion of the Court on the understanding that it *leaves open* the question whether §76-7-304(2) unconstitutionally burdens the right of a mature minor or a minor whose best interest would not be served by parental notification.") (emphasis added); *Id.* at 420-421 (Stevens, J., concurring) (Court should have addressed the question of whether a State may require notification of all minor women regardless of their maturity and should have held that it may require such notice).

> legitimate purposes such as the advancement of [the state's] compelling interest . . . An undue burden will generally be found "in situations involving absolute obstacles or severe limitations on the abortion decision," not wherever a state regulation "may 'inhibit' abortions to some degree."

Thornburgh, 476 U.S. at 828 (internal citations omitted).

There is a fundamental difference between a statute which requires parental consent prior to the performance of an abortion on a minor and one which requires only that parents be notified prior to the abortion. This Court has viewed a requirement of consent as granting to parents "an absolute, and possibly arbitrary, veto over the decision of the physician and his patient to terminate the patient's pregnancy, regardless of the reason for withholding the consent." *Planned Parenthood v. Danforth,* 428 U.S. at 74.[6] In contrast, a notice requirement grants no veto power to the parents whatsoever. Regardless of her parents' wishes, the minor may obtain an abortion once her parents have been notified. Thus, a requirement of parental notice does not involve an "absolute obstacle" to or even a "severe limitation" on abortion. Accordingly, it does not constitute an "undue burden."[7]

Since a requirement of parental notice does not constitute an "undue burden," it need only rationally relate to the state's legitimate interests. Minnesota has a legitimate and compelling interest in protecting the rights of parents to counsel their children on important decisions and in protecting minors "who often lack the ability to make fully informed choices that take account of both immediate and long-range consequences [of

6. Justice Stevens, however, argued persuasively in *Danforth* that a parental consent requirement is justified by the state's compelling interests. 428 U.S. at 102-105 (Stevens, J., dissenting).

7. The fact that the Minnesota law requires a 48-hour waiting period does not alter this conclusion. The waiting period is designed to allow parents some meaningful opportunity to consult with their daughters and merely postpones the effectuation of the minor's decision. Should the parents disagree with a decision to abort, they cannot prevent the minor from obtaining an abortion by withholding their consent. Rather, at the conclusion of the waiting period, the minor may effectuate her decision despite her parents wishes.

their decisions]," from making imprudent decisions without the benefit of their parents' guidance. *Bellotti II,* 443 U.S. at 640. *See also, Matheson,* 450 U.S. at 421 (Stevens, J., concurring) (the state's interest is "fundamental and substantial.") Requiring that parents be notified prior to the performance of an abortion upon their minor daughter and affording them an opportunity to consult with her and advise her regarding the wisdom of undergoing an abortion certainly furthers both of the state's interests.

Plaintiffs argue that there is no need for parental notice laws and that such laws are not rationally related to the state's interest in assuring that a wise decision is made regarding the desirability of abortion. They base this claim, in part, upon expert testimony from their witnesses, that by age 14 minors are indistinguishable from adults in their capacity to make personal decisions. Aside from the fact that such an assertion conflicts with common sense and experience, it has been soundly criticized in technical journals as overstating the premise. *See* Gardner, Scherier & Tester, *Asserting Scientific Authority: Cognitive Development and Adolescent Legal Rights,* American Psychologist, 895-902 (June, 1989) (criticizing assertions of "fact" regarding equivalence of decision-making skills of children and adults in briefs filed in this Court in *Hartigan v. Zbaraz).*

Indeed, much of the plaintiffs' expert testimony regarding the maturity of minors to make the abortion decision without parental involvement reflects a pro-abortion mentality – starting from the premise that a decision to undergo an abortion evidences maturity and that, *a fortiori,* a minor who desires an abortion is mature. States must not be restricted to legislating in a manner which relies upon such biased assumptions and "facts" which are largely unprovable.

C. Assuming, *Arguendo,* that a Requirement of Parental Notice Does Constitute an "Undue Burden" on Abortion, Thereby Triggering Heightened Scrutiny, the Statute is Still Constitutional Because it is Reasonably Related to Compelling State Interests.

Heightened judicial scrutiny of state abortion regulations is, as Justice O'Connor stated:

> . . . reserved for instances in which the state has imposed an "undue burden" on the abortion decision . . . And if a state law does interfere with the abortion decision to an extent that is unduly burdensome, so that it becomes "necessary to apply an exacting standard of review," the possibility remains that the statute will withstand the stricter scrutiny.

Thornburgh, 476 U.S. at 828, O'Connor, J., dissenting.

The "stricter scrutiny" applied by this Court in abortion cases, however, does not encompass the "narrowly drawn" test traditionally applied to statutes involving fundamental rights. As Justice O'Connor noted in *Akron:*

> The Court has never required that state regulation that burdens the abortion decision be "narrowly drawn" to express only the relevant state interest. In *Roe*, the Court mentioned "narrowly drawn" legislative enactments, 410 U.S. at 155, but the Court never actually adopted this standard in the *Roe* analysis. In its decision today, the Court fully endorses the *Roe* requirement that a burdensome health regulation, or as the Court appears to call it, a "significant obstacle," (citation omitted) be "reasonably related" to the state's compelling interest.

Akron, 462 U.S. 416, 467-468, n.11.[8]

8. The *Roe* Court noted that "[w]here *certain* 'fundamental rights' are involved, the Court has held that regulation limiting those rights may be justified only by a 'compelling interest,' and that legislative enactments must be narrowly drawn to express only the legitimate state interests at stake." 410 U.S. at 155 (citations omitted) (emphasis added). Although this passage of *Roe* is often quoted as the appropriate standard of review for abortion legislation, the Roe Court clearly did not adopt the "narrowly drawn" part of that test. The above comment was made in the context of a review of the Court's approach previously taken toward various privacy interests—*i.e.*, marital intimacy, marriage and contraceptives. After tracing the manner in which fundamental rights grounded in privacy traditionally had been reviewed, the Court stated that the fundamental right of privacy as it concerned abortion was inherently different from those other fundamental rights. *Id.* at 159.

This "reasonableness" test was relied upon by the Court throughout its 1983 decisions. For example, in *Akron*, the Court stated:

> [T]he state "may regulate the abortion procedure to the extent that the regulation *reasonably relates* to the preservation and protection of maternal health." Roe, 410 U.S. at 163.

462 U.S. at 430-431 (emphasis added). Again, in *Ashcroft*, the Court upheld the Missouri statute requiring that a second physician be present during post-viable abortions because it "reasonably further[ed] the State's compelling interest in protecting the lives of viable fetuses." 462 U.S. at 486.[9]

The test ultimately adopted in *Roe* was an intermediate one which reflects the differences, noted by the Court, between the right of privacy as it concerns abortion and that right as it concerns other fundamental interests which do not involve "potential life." After noting that the state's interest in maternal health becomes compelling at approximately the end of the first trimester, the Court held that states could regulate abortions after that stage in pregnancy in a manner that "*reasonably relates* to the preservation of maternal health." *Roe*, 410 U.S. at 163 (emphasis added).

9. The Court upheld this requirement even for abortions performed by dismemberment (D&E) when there was no possibility of fetal survival. Justice Blackmun, in dissent, felt that the Court's relaxed and flexible approach was an unjustified departure from "narrowly drawn" standards applied in other privacy areas. Thus he stated:

> When a D&E abortion is performed, the second physician can do nothing that furthers the state's compelling interest in protecting potential life. His presence is superfluous . . . . Because the statute is not tailored to protect the state's legitimate interest, I would hold it invalid.

Id. at 500. A majority of the *Ashcroft* Court, however, rejected Justice Blackmun's reasoning and his application of a narrowly drawn approach to such legislation. Instead, it applied the reasonableness test adopted in *Roe* and reaffirmed in *Akron*.

> [T]he state's compelling interest in protecting the viable fetus justifies the second physician requirement even though there may be the rare case when a physician may think honestly that D&E is required for the mother's health. *Legislation need not accommodate every conceivable contingency.*

Id. at 484 n.7 (emphasis added).

Moreover, it is clear that the "narrowly drawn" test has not been applied in the context of statutes requiring parental involvement. For example, in *Bellotti II,* Justice Powell stated:

> As [the Massachusetts law] provides for involvement of the state superior court in minors' abortion decisions, we discuss the alternative procedure described in this text in terms of judicial proceedings. We do not suggest, however, that a state choosing to require parental consent could not delegate the alternative procedure to a juvenile court or an administrative agency or office. Indeed, much can be said for employing procedures and a forum less formal than those associated with a court of general jurisdiction.

443 U.S. at 643, n.22. Certainly, employment of "procedures and a forum less formal than those associated with a court of general jurisdiction" would be less restrictive than requiring minors to pursue a judicial alternative to parental consent. Although the Court recognized that such less restrictive alternatives were available, it held that the states could impose the more burdensome requirement of proceeding in a court of general jurisdiction.

Thus, plaintiffs' claim that a "parental involvement requirement, with or without a judicial bypass system, cannot be sustained unless the state is able to prove that the statute is necessary, narrowly tailored, and actually serving state interests previously recognized as significant or compelling" (Petition for Certiorari at 9 n.15) is unsupported by this Court's prior decisions and must be rejected.

Assuming, *arguendo,* that a requirement of parental notice does constitute an "undue burden," it is still constitutional under the above standerds. Parents have a fundamental constitutional right to direct the upbringing of their children. *Bellotti II,* 443 U.S. at 637-639. It is virtually impossible for them to exercise this right and fulfill their responsibilities regarding the upbringing of their children when those children are spirited away and convinced to have abortions without notifying their

parents.[10] To hold that the Constitution requires a judicial alternative to parental notice would effectively nullify the fundamental right of parents to have a guiding role in the upbringing of their children. At a minimum, parents have a right to be notified when their children are in stressful circumstances, faced with decisions having irreversible and grave consequences, and to offer them advice and guidance. Thus, the parental notice law furthers the state's compelling interest in protecting parental rights.

The state also has a compelling interest in protecting pregnant minors from the consequences of an incorrect abortion decision. As has been noted several times by members of the Court:

> There can be little doubt that the state furthers a constitutionally permissible end by encouraging an unmarried pregnant minor to seek the help and advice of her parents in making the very important decision whether or not to bear a child. That is a grave decision, and a girl of tender years, under emotional distress, may be ill equipped to make it without mature advice and emotional support. It seems unlikely that she will obtain adequate counsel and

10. A California case is illustrative of this concern. In *Preston v. Thermalito School District, et al.,* No. 89930 (Butte County, California Superior Court filed Mar. 24, 1986, refiled Dec. 15, 1986), a junior high school teacher, through a course of deceptive conduct, arranged for an abortion for a 14 year old immature and unemancipated minor student without notifying the child's parents, despite the fact that the mother had personally visited the school principal to request that she, through a system of "daily reports," be kept apprised of all matters relating to her daughter.

The facts allege that despite the mother's explicit plea to be so informed, the daily reports were manipulated by the school in an effort to conceal the fact that the minor had been excused from school on several occasions relative to the abortion. In addition, the teacher sent the mother a note seeking permission for the girl to babysit at the teacher's home, when in fact the teacher planned to transport the minor to have the abortion.

The girl's mother did not learn of the deception and the abortion until four days later when summoned to the hospital emergency room where her minor daughter was undergoing emergency surgery for post-abortion complications.

> support from the attending physician at an abortion clinic, where abortions for pregnant minors frequently take place.

Danforth, 428 U.S. at 91 (Stewart, J., concurring) (footnote omitted); *Bellotti II*, 443 U.S. at 621-22 (Powell, J.,).

It remains true that the vast majority of minors obtain abortions in clinics where they are counseled, if at all, by those who do not know them and, thus, have no reliable way of judging what is in their best interest. In addition, the fact that the salaries of clinic "counselors" are paid by the abortion clinic which profits when they convince a minor to have an abortion hardly ensures that they will be provided unbiased information.

Moreover, it is quite possible that many teenagers will misjudge their parents' reactions. As Justice Stevens noted in *Matheson*:

> If there is no parental-[notice] requirement, many minors will submit to the abortion procedure without ever informing their parents. An assumption that the parental reaction will be hostile, disparaging, or violent no doubt persuades many children simply to bypass parental counsel which would in fact be loving, supportive, and, indeed, for some indispensable. It is unrealistic, in my judgment, to assume that every parent-child relationship is either (a) so perfect that communication and accord will take place routinely or (b) so imperfect that the absence of communication reflects the child's correct prediction that the parent will . . . [act] arbitrarily to further a selfish interest rather than the child's interest. A state legislature may conclude that most parents will be primarily interested in the welfare of their children, and further, that the imposition of a parental-[notice] requirement is an appropriate method of giving the parents an opportunity to foster that welfare by helping a pregnant distressed child to make and to implement a correct decision.

450 U.S. at 423-424. Also, as Justice Stevens aptly noted:

> The possibility that some parents will not react with compassion and understanding upon being informed of their daughter's predicament or that, even if they are receptive, they will incorrectly advise her, does not undercut the legitimacy of the State's attempt to establish a procedure that will enhance the probability that a pregnant young woman exercise as wisely as possible her right to make the abortion decision.

Id. at 424.

Thus, states should not be forced to provide a bypass procedure to the notification requirement. The record in this case shows that some Minnesota judges simply "rubber stamp" petitions of minors utilizing the bypass procedure. *Hodgson v. Minnesota*, 648 F.Supp. 756 (D.Minn.1986). Contrary to plaintiffs' assertions, however, this fact does not indicate that parental notice laws serve no purpose. Instead, it demonstrates only that the states are prevented from adequately furthering their interests in preserving parental rights and protecting minor children when they are required to provide "rubber-stamp" bypass procedures.

The Minnesota law reasonably relates to the State's interest in protecting pregnant minors by assuring that those who are most likely to have the minor's best interests in mind—her parents—are given the opportunity to provide her advice. This protects the pregnant minor from being left to rely on whatever information biased and unfamiliar clinic personnel wish to provide.

Finally, the State has a legitimate and compelling interest in protecting fetal life which exists throughout pregnancy. *Ashcroft*, 462 U.S. at 505 (O'Connor, J., dissenting). The state also has a compelling interest in preventing teen pregnancy—a problem of seemingly runaway proportion. Prior to enforcement of the Minnesota parental notice law, the number of teen pregnancies and abortions had been steadily increasing. After the law became effective, both the teen abortion rate and teen pregnancy rate dropped substantially.[11] Thus, the Minnesota

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11. In Minnesota, between 1980 (the last full year prior to enforcement of the parental notice law) and 1984, (a time during which the law was in effect), the number of abortions for teenagers under the age of 18 dropped from 2,327 to 1,395—a decline of 40.1%— and the decline in the abortion rate

law has also furthered these state interests.

II. THE COURT SHOULD REEXAMINE *ROE V. WADE* AND OVERRULE IT.

In *Webster v. Reproductive Health Service,* five Justices of this Court expressed the view that *Roe's* trimester framework is "unworkable," "flawed," and "problematic." 106 L.Ed.2d at 435-36 (Rehnquist, C.J., joined by Kennedy, J. and White, J.); *Id.* at 443 (O'Connor, J., concurring); *Id.* at 445 (Scalia, J., concurring). However, only Justice Scalia stated that he was willing to reexamine *Roe* and overrule it explicitly. And, although Justices Rehnquist, White and Kennedy would have abandoned the *Roe* trimester framework in *Webster,*[12] Justice O'Connor did not feel it necessary to reject that framework

for this age group was 32.2%. Figures based on data contained in *Reported Induced Abortions,* published yearly by the Minnesota Department of Health. For the same time period and age group, the number of births dropped from 2,083 to 1,654—a decline of 18.6%—and the birthrate dropped statewide by 7.9%. Figures obtained from Minnesota Department of Health computer printouts regarding births and female population size. Also during this time period, the number of pregnancies (abortions plus births) for Minnesota teens under age 18 dropped from 4,360 to 3,049—a decline of 30.1%—and the pregnancy rate decreased 20.9%. *Id.*

Thus, not only does it appear that the parental notice law has reduced the number of teen abortions, it also appears that the law has had a beneficial impact on reducing the overall teen pregnancy rate. Indeed, that teens are avoiding pregnancy altogether is also supported by the statements made by a pregnant teen seeking an abortion in Utah. In response to a question from the judge regarding whether she had attempted to prevent the pregnancy the pregnant girl indicated that she had not since she thought she could easily obtain an abortion without her parents learning about it. *H.B. v. Wilkinson,* 639 F.Supp. 952, 956 (D.Utah 1986). Presumably, this girl would have used preventive measures or avoided sexual activity had she known, in advance, that her parents would be notified in the event she became pregnant and sought an abortion.

12. It should be noted that while Justice Rehnquist stated that *Roe* need not be reevaluated because Missouri had chosen viability as the point at which it wished to protect fetal life, that statement fails to recognize that Missouri "chose" the point of viability to regulate on behalf of fetal life only because this Court struck down its prior law which protected the unborn child throughout pregnancy, in *Danforth v. Rodgers,* 414 U.S. 1035 (1973).

despite her continued belief that it "cannot be supported as a legitimate or useful framework" and has "no justification in law or logic." *Akron,* 462 U.S. at 453, 459.

Amici urge the Court to abandon this piecemeal approach because it effectively places the state legislatures in no-man's-land. *Amici* are required to attempt to divine the views of the various Justices regarding the extent to which abortion is constitutionally protected in order to enact legislation which will protect unborn children to the fullest extent possible. This, of course, is a very difficult task given the variety of opinions issued in *Webster.*

Consequently, *amici* respectfully submit that the Court should determine the proper benchmark by which statutes regulating abortion should be judged *before* evaluating the constitutionality of those statutes. Such a determination would be greatly preferable to the unpredictable course resulting from the division of opinion in *Webster.*

The issue of abortion is divisive and hotly disputed in the legislative arena as well as this Court. As Justice O'Connor stated in *Thornburgh,* this Court's abortion decisions "have already worked a major distortion in the Court's constitutional jurisprudence" and have had an "institutionally debilitating effect" on the Court. *Thornburgh,* 476 U.S. at 814 (O'Connor, J., dissenting). *Amici* submit that the absence of an identifiable standard after *Webster*—thus requiring the state legislatures to speculate about the scope of the "limited" nature of the right to abort—will have a similar "institutionally debilitating effect" upon the State General Assemblies.[13]

Without definite guidance from the Court regarding the constitutional limits on their ability to enact legislation, the states will be forced to address the issue with great uncertainty again and again--to the potential detriment of other pressing business. Given that the members of the General Assemblies of the various states take an oath to uphold the Constitution, it is

13. Significantly, whenever the General Assembly is wrong in its assessment, the Commonwealth may be penalized by having substantial awards of attorneys' fees assessed against it.

appropriate for this Court to declare whether the right of privacy protected by the Constitution includes the right to obtain an abortion. And, if the Constitution presently does not prohibit states from protecting fetal life, the Court should make this known to the states so that they may be allowed to regulate to the fullest extent constitutionally permissible, if they so choose.[14]

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14. Although only a few states would probably limit abortions to those necessary to preserve a woman's life, dire predictions abound of women dying from "back alley" abortions. These predictions are simply unfounded. For example, a leading member of the pre-*Roe* "abortion reform" movement, Dr. Bernard N. Nathanson (co-founder of the National Abortion Rights Action League), has admitted to his organization's knowing falsification of "back-alley" abortion death statistics:

> How many deaths were we talking about when abortion was illegal? In N.A.R.A.L. we generally emphasized the drama of the individual case, not the mass statistics, but when we spoke of the latter it was always "5,000-10,000 deaths a year." I confess that I knew the figures were totally false, and I suppose the others did too if they stopped to think of it. But in the 'morality' of our revolution, it was a *useful* figure, widely accepted, so why go out of the way to correct it with honest statistics? The overriding concern was to get the laws eliminated, and anything within reason that had to be done was permissible.

B.N. Nathanson, M.D., *Aborting America*, at 193 (1979).

In 1972 prior to *Roe*, 33 states prohibited abortions except where necessary to preserve the life of the mother, while others permitted abortion in various circumstances. The CDC report on induced abortions shows that during 1972 (when medical technology was not as advanced as today) 24 women died from legal abortions while 39 died from illegal abortions. *Centers for Disease Control: Abortion Surveillance 1981*, p. 51, Figure 8. It is unlikely that, in the present political climate, 33 states will be able to pass legislation limiting abortions to life-of-the-mother situations. But even if this many states were to do so, with advances in medical care, it is exceedingly unlikely that anywhere near 39 women would die of illegal abortions.

Moreover, in 1973, after *Roe* made abortion legal on demand, 25 women died from legal abortions and 19 died from illegal abortions. Thus, legalizing abortion on demand has had little impact on the number of maternal deaths from abortion. Indeed, between 1973 and 1982 (the last year for which statistics are available) while abortions have been legal on demand, almost four times as many women have died from legal abortion as from illegal abortions. *Id.*

At the core of the majority opinion in *Roe* there operates the fundamental fallacy that state legislatures are constitutionally forbidden to provide significant legal protection for human life at its most vulnerable stage. Yet it is state legislatures which are expressly designed as fora for the resolution and continuing adjustment of such difficult governmental questions. *Roe's* disregard for the judgment of state legislators casts this Court in the role of deciding essentially legislative questions, and transfers the burden of correcting "unwise" legislative judgments from the electoral process to the federal courts. Not only does this assumption of the legislative role sap the legitimacy of the courts, it has failed to achieve the political stabilization of the issue of abortion which was its evident purpose. *Roe* has only served to postpone the achievement of that stabilization.

In an earlier time, Justice Holmes urged the prompt correction of the fallacious premise of *Swift v. Tyson*, 16 Pet. 1 (1842):

> [T]he fallacy has resulted in an unconstitutional assumption of powers by the courts of the United States which no lapse of time or respectable array of opinion should make us hesitate to correct.

Meanwhile, unborn children die at a rate of 1.5 million per year--with approximately 1%, or 15,000 per year (220,000 since *Roe*), being killed between the 20th week of pregnancy and birth. *Centers for Disease Control: Abortion Surveillance 1981*, p.iv, Summary Table. Such late-term abortions must be allowed for any reason relevant to the "health" of the woman. *Roe v. Wade*, 410 U.S. at 163. As defined in *Doe v. Bolton*, "health" is broad, indeed, including emotional well-being and the woman's family situation. 410 U.S. 179, 192 (1973); *A.C.O.G. v. Thornburgh*, 737 F.2d 283, 299 (3rd Cir. 1984) (the broad definition of "health" applies to abortions after viability as well as before viability). Indeed, few late-term abortions are performed due to risk to the physical health of the mother. A recent study indicated that 71% of the women obtaining abortions after the 16th week of pregnancy did so because they did not recognize that they were pregnant or had misjudged gestation. Torres & Forrest, *Why do Women Have Abortions?*, 20 Family Planning Perspectives 169, 174 (Table 4) (1988), Maternal health as a reason for late-term abortion did not have sufficient statistical significance even to be listed in the table. *Id.* And, the study states that women "were less likely to be having a later abortion . . . if they were having health problems. . ." *Id.*

Black & White Taxicab and Transfer Co. v. Brown & Yellow Taxicab and Transfer Co., 276 U.S. 518, 533 (1928).

What was at stake in the abandonment of the rule of federal common law of *Swift v. Tyson* was primarily parameters of federal-state relationships and rights of private property. *Roe* has not only skewed legislative-judicial relationships, it has cost the rights of over 20 million potential citizens to have any say at all over their own life or death. The tragedy of *Roe* is certainly manifest in the loss of human life it has occasioned, but it is also manifest in the powerlessness to correct that situation which has been enforced on the voting citizens of this nation.

CONCLUSION

For the foregoing reasons, *amici curiae* request that this Court uphold Minnesota's parental notice law in its entirety and reexamine and overrule *Roe v. Wade* so that the states may be given greater flexibility to protect unborn human life.

Respectfully submitted,

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APPENDIX

APPENDIX A

THE *AMICI CURIAE*

The *amici curiae* consist of members of the General Assembly of the Commonwealth of Pennsylvania, including the following:

Senators: D. Michael Fisher (R) Allegheny; Edward W. Helfrick (R) Westmoreland; J. William Lincoln (D) Fayette; Robert J. Mellow (D) Lackawanna; Raphael J. Musto (D) Luzerne; Terry L. Punt (R) Franklin; M. Joseph Rocks (R) Philadelphia; Frank A. Salvatore (R) Philadelphia; John J. Schumaker (R) Dauphin; William J. Stewart (D) Cambria.

House Members: John E. Barley (R) Lancaster; Fred Belardi (D) Lackawanna; Robert E. Belfanti, Jr. (D) Northumberland; Jerry Birmelin (R) Wayne; Kevin Blaum (D) Luzerne; Karl W. Boyes (R) Erie; Raymond Bunt, Jr. (R) Montgomery; James M. Burd (R) Butler; Alvin C. Bush (R) Lycoming; Thomas R. Caltagirone (D) Berks; Edgar A. Carlson (R) Tioga; Gaynor Cawley (D) Lackawanna; Richard J. Cessar (R) Allegheny; Mario J. Civero, Jr. (R) Delaware; Nicholas A. Colafella (D) Beaver; Anthony L. Colaizzo (D) Washington; Anthony M. DeLuca (D) Allegheny; Thomas W. Dempsey (R) Lycoming; Scott Dietterick (R) Luzerne; Rudolph Dininni (R) Dauphin; Jim Distler (R) Elk; Bernard J. Dombrowski (D) (Erie); Thomas J. Fee (D) Lawrence; Patrick E. Fleagle (R) Franklin; A. Carville Foster (R) York; Stephen F. Freind (R) Delaware; James J. Gallen (R) Berks; Ron Gamble (D) Allegheny; Frank J. Gigliotti (D) Allegheny; Leonard Q. Gruppo (R) Northampton; George C. Hasay (R) Luzerne; Arthur D. Hershey (R) Chester; Stanley J. Jarolin (D) Luzerne; Edwin G. Johnson (R) Blair; Ralph Kaiser (D) Allegheny; Ted V. Kondrich (R) Allegheny; Gerard A. Kosinski (D) Philadelphia; Susan Laughlin (D) Beaver; Dennis E. Leh (R) Berks; William R. Lloyd, Jr. (D)

Somerset; Edward J. Lucyk (D) Schuylkill; Joseph Markosek (D) Allegheny; Keith R. McCall (D) Carbon; Christopher K. McNally (D) Allegheny; Emil Mrkonic (D) Allegheny; Dennis M. O'Brien (R) Philadelphia; Richard D. Olasz (D) Allegheny; John M. Perzel (R) Philadelphia; Merle H. Phillips (R) Northumberland; Joseph R. Pitts (R) Chester; Jere W. Schuler (R) Lancaster; Frank A. Serafini (R) Lackawanna; Edward G. Stabeck (D) Lackawanna; Thomas B. Stish (D) Luzerne; Jere L. Strittmatter (R) Lancaster; Ted Stuban (D) Columbia; Leona G. Telek (R) Cambria; Thomas M. Tigue (D) Luzerne; Fred A. Trello (D) Allegheny; Peter R. Vroon (R) Chester; Christopher R. Wogan (R) Philadelphia; Frank W. Yandrisevits (D) Northampton.